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Supreme Court, U.S.
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No. 00-1561

In the
Supreme Court of the United States

KIMBERLY F. GODON

Petitioner,

v.

NORTH CAROLINA CRIME CONTROL & PUBLIC SAFETY; NORTH CAROLINA TARHEEL CHALLENGE ACADEMY; KENNETH STALLS, in his individual and official capacities; DALE AUTRY, in his individual and official capacities; LESLIE T. EVERETT, in his individual and official capacities; STATE OF NORTH CAROLINA,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER, UNDER THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EQUITABLE REMEDY OF REINSTATEMENT IS AVAILABLE TO A FORMER STATE EMPLOYEE WHO WAS EMPLOYED UNDER A TIME-LIMITED CONTRACT WHICH HAS NOW EXPIRED AND WHO CLAIMS HER CONTRACT WAS TERMINATED AS A RESULT OF A LEGITIMATE EXERCISE OF HER FIRST AMENDMENT RIGHTS?

II. WHETHER A PLAINTIFF WHO DEFEATS A DEFENDANT'S MOTIONS PURSUANT RULES 12(B)(6) AND 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE IS ENTITLED TO A TRIAL?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Tarheel Challenge Academy ("the Academy") is a quasi-military style program for youths sixteen (16) to eighteen (18) years of age who are high school dropouts and expellees, and is sponsored by the North Carolina National Guard which is a division of the Department of Crime Control and Public Safety ("CC&PS"). The program consists of two phases: a

twenty-two (22) week in-residence phase and a post-resident phase of twelve (12) months. During the in-resident phase, cadets attend school, eat, sleep, wear uniforms, and learn to work within a highly structured and disciplined program. The purpose of the Academy is to enable the cadets to receive a GED (high school equivalent diploma) and to develop the necessary skills to succeed after the cadet completes the program. The cadets are subject to a rigorous behavior code and any infractions are documented and if sufficiently serious or persistent can result in expulsion from the program. The cadre, or cadet supervisors, are also expected to conform to a high standard of behavior and to set a good example for the cadets as set forth in the Cadre Standard Operating Procedure.

The management structure of the Academy consisted of respondent Leslie T. Everett, the Director, respondent Kenneth Stalls, the Deputy Director, and respondent Dale Autry, the Assistant Commandant.

On August 26, 1994, petitioner entered into a written one-year contract with CC&PS to perform the function of Team Leader at the Academy. App. at 3a-6a. The agreement set forth petitioner's responsibilities as a Team Leader which included supervising the training of a platoon consisting of twenty-five (25) cadets. App. at 1a-3a. The agreement also provided that "if, through any cause, the CONTRACTOR shall fail to fulfill in a timely and proper manner the obligations under this Agreement," that the contract could be terminated by the agency upon a one-day written notice. App. at 4a.

From August until the spring of 1995, petitioner's job performance was satisfactory. However, during April and May of 1995, petitioner rapidly began accumulating negative performance evaluations which prompted several counseling sessions with petitioner. On May 17, 1995, Director Everett

gave petitioner written notice of her contract termination based on the following specific grounds:

> a) By your own admission to Mr. Autry on May 9, 1995, you acknowledged you had given permission for female cadets to sleep together in single/one person beds for "safety and security reasons." You also acknowledged that Mr. Boone, the Commandant of cadets, had specifically told you such a practice was not allowed.
>
> b) You received a verbal counseling on April 28 and a written on May 5, 1995 regarding certain aspects of your performance of duty (Team Leader) in which you were placed on probation for the remainder of your contract. On May 6, 1995, you told the cadets that you had been counseled and placed on probation. Later that day, Mr. Autry was presented a copy of a petition signed by approximately 60 personnel, (mainly cadets) asking that we (the Academy) keep you here as Team Leader for Team 1.

App. at 7a.

Petitioner filed the present action on September 16, 1996 claiming that the true reason for her discharge was that she had complained to Stalls and Autry about their discriminatory and disproportionate termination without cause of the facility's female and black cadets while they permitted white male cadets to remain enrolled in the program although their infractions were sufficiently severe to result in termination.

In its Order entered October 7, 1999, the District Court dismissed the individually named defendants in their official capacity stating: "Although under the doctrine of Ex parte Young, 209 U.S. 123, 159-60 (1908), prospective injunctive relief is available in a claim against state officers in their official capacities, the reinstatement Plaintiff seeks is not prospective, and thus Plaintiff's official capacity claim is barred by the Eleventh Amendment." Pet. App. at 10. On appeal, the Fourth Circuit Court of Appeals affirmed the dismissal of the individually named defendants in their official capacity stating: "For the reasons given by the district court, we affirm its dismissal of the State defendants and the individual defendants in their official capacity." Pet. App. at 5.

SUMMARY OF THE ARGUMENT

The narrow issue presented for the Court's consideration by this Petition for Writ of Certiorari is whether, under the Eleventh Amendment to the United States Constitution, the equitable remedy of reinstatement is available to a former state employee who was employed under a time-limited contract which has now expired and who claims her contract was terminated as a result of a legitimate exercise of her First Amendment rights. Petitioner, Kimberly F. Godon, asserts that the Fourth Circuit Court of Appeals erroneously affirmed the dismissal of the individually named defendants in their official capacity in that reinstatement, which she denominates "prospective injunctive relief," is a remedy which is not barred by the Eleventh Amendment under Ex parte Young. Petitioner seeks a Writ of Certiorari on the ground that the Fourth Circuit's decision affirming the dismissal of the individually named defendants in their official capacity is in conflict with decisions of this Court, other Fourth Circuit decisions and decisions of other Circuit Courts of Appeal.

Respondents contend that this Court should deny the Petition for Certiorari because the dismissal of the individually named defendants in their official capacity was correct since a state employee, employed under a time-limited contract which has expired, is not entitled to reinstatement as a species of prospective injunctive relief under this Court's Eleventh Amendment jurisprudence.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF THE SUPREME COURT, THE FOURTH CIRCUIT'S OWN PRIOR DECISIONS OR DECISIONS OF OTHER FEDERAL COURTS OF APPEAL BECAUSE A FORMER STATE EMPLOYEE WHO WAS EMPLOYED UNDER A TIME-LIMITED CONTRACT WHICH HAS EXPIRED IS NOT ENTITLED TO REINSTATEMENT AS PROSPECTIVE INJUNCTIVE RELIEF.

A. First Amendment

The respondents acknowledge that "[i]t is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." Rankin v McPherson, 483 U.S. 378, 383 (1987) (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)). See Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 283-84 (1977); Pickering v. Board of Education, 391 U.S. 563, 568 (1968). In addition, this Court further stated in Rankin: "Even though McPherson was merely a probationary employee, and even if she could have been discharged for any reason or for no reason at all, she may nonetheless be entitled

to reinstatement if she was discharged for exercising her constitutional right to freedom of expression." 483 U.S. at 383-84. However, it is important to note that Ardith McPherson was employed as a deputy in the office of the Constable of Harris County, Texas. Id. at 380. Marvin L. Pickering was employed as a teacher in Township High School District 205, Will County, Illinois. Pickering, 391 U.S. at 564. Fred Doyle was employed by the Mt. Healthy Board of Education which was a local school board. Mt. Healthy, 429 U.S. at 280. However, because the Eleventh Amendment does not protect cities or counties, Will v. Michigan Dep't of State Police, 491 U.S. 58, 70 (1989), none of the foregoing cases implicate Eleventh Amendment immunity applicable to **state** employees' First Amendment suits. Although Robert Sindermann was employed as a teacher in the state college system of the State of Texas, the Sindermann case was essentially decided on whether Sindermann was entitled to demonstrate that he possessed a protected property interest in his employment sufficient to require procedural due process in the form of a hearing "where he could be informed of the grounds for his nonretention and challenge their sufficiency." 408 U.S. at 603.

Our research does not reveal any case where this Court has directly addressed the issue of whether the Eleventh Amendment permits injunctive relief in the form of reinstatement against a **state** employer found to have wrongfully discharged a **state** employee in violation of the employee's constitutional rights.

B. Eleventh Amendment Sovereign Immunity

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by

Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

> This language expressly encompasses only suits brought against a State by citizens of another State, but this Court long ago held that the Amendment bars suits against a State by citizens of that same State as well. See Hans v. Louisiana, 134 U.S. 1 (1890), 10 S. Ct. 504, 33 L. Ed.2d 842. "[In] the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100, 104 S. Ct., at 907-909 (1984). This bar exists whether the relief sought is legal or equitable. Id., at 100-101.

Papasan v. Allain, 478 U.S. 265, 276 (1986) (footnote omitted).

Sovereign immunity not only encompasses states qua states and state entities, but includes government officials as well. As this Court explained:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. See, e.g., Scheuer v. Rhodes, 416 U.S. 232, 237-238, 94 S. Ct. 1683, 1686-87, 40 L. Ed. 2d 90 (1974). Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690, n.55, 98 S. Ct. 2018, 2035 n.55, 56 L. Ed. 2d 611 (1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity

> suit is, in all respects other than name, to be treated as a suit against the entity. Brandon, supra, 469 U.S., at 471-472, 105 S. Ct., at 878.

Kentucky v. Graham, 473 U.S. 159, 165-66 (1985).

C. Ex parte Young and Prospective Injunctive Relief

A narrow exception to Eleventh Amendment immunity has long been recognized by this Court which applies to individuals named as defendants in their official capacity.

> The landmark case of Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed.2d 714 (1908), created an exception to this general principle by asserting that a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State. Id., at 159-160, 28 S. Ct., at 453-54. The theory of Young was that an unconstitutional statute is void, id., at 159, 28 S. Ct., at 453-54 and therefore does not "impart to [the official] any immunity from responsibility to the supreme authority of the United States." Id., at 160, 28 S. Ct., at 454. Young also held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent **a continuing violation of federal law**. Id., at 155-156, 159, 28 S. Ct., at 452-53. We have refused to extend the reasoning of Young, however, to claims for retrospective relief.

Green v. Mansour, 474 U.S. 64, 68 (1985) (emphasis added) (citations omitted). As this Court explained more recently:

> The doctrine of Ex parte Young, which ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law, is regarded as carving out a necessary exception to Eleventh Amendment immunity. See, e. g., Green v. Mansour, 474 U.S. 64, 68, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985). Moreover, the exception is narrow: It applies only to prospective relief, does not permit judgments against state officers declaring that they violated federal law in the past, id. at 73, 106 S. Ct., at 428, and has no application in suits against the States and their agencies, which are barred regardless of the relief sought, Cory v. White, supra. Rather than defining the nature of Eleventh Amendment immunity, Young and its progeny render the Amendment wholly inapplicable to a certain class of suits. Such suits are deemed to be against officials and not the States or their agencies, which retain their immunity against all suits in federal court.

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993). See also Will, 491 U.S. at 71 n.10 (1989) ("[O]fficial-capacity actions for prospective relief are not treated as actions against the State."); Edelman v. Jordan, 415 U.S. 651, 664 (1974) ("[T]he relief awarded in Ex parte Young was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment.").

D. Requirements For Applying Ex parte Young

In Papasan, this Court addressed the issue raised in this Petition; namely, the circumstances under which an individual

defendant acting in his/her official capacity can be subject to a mandatory injunction.

> In accordance with its original rationale, Young applies only where the **underlying authorization** upon which the named official acts is asserted to be illegal. See Cory v. White, 457 U.S. 85, 102 S. Ct. 2325, 72 L. Ed. 2d 694 (1982) . . .
>
> . . . Consequently, Young has been focused on cases in which a violation of federal law by a state official is **ongoing** as opposed to cases in which a violation of federal law has been violated at one time or over a period of time in the past, as well as on cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interest such as compensation. As we have noted: "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." Green v. Mansour, 474 U.S. 64, 68, 106 S. Ct. 423, 426, 88 L. Ed. 2d 371 (1985) (citation omitted).

Papasan, 478 U.S. at 277-78 (emphasis added).

The requirement that a violation be ongoing is in accord with traditional equitable principles which require that an "equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there

is no showing of any real or immediate threat that the plaintiff will be wronged again — a 'likelihood of substantial and immediate irreparable injury.'" City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (internal citation omitted) (no injunction would issue to enjoin future use of illegal chokeholds by the police).

E. Circuit Courts of Appeal Decisions

Defendants acknowledge that several Circuit Courts of Appeal, including the Fourth Circuit, have held that reinstatement is a form of prospective injunctive relief. See cases cited at page 6, Petition. See also Doe v. Lawrence Livermore Nat. Laboratory, 131 F.3d 836, 839-42 (9th Cir. 1997) (discussing rationale of reinstatement of physicist as prospective injunctive relief), rev'd on other grounds sub nom. Regents of the University of California v. Doe, 519 U.S. 425 (1997); Treleven v. University of Minnesota, 73 F.3d 816, 819 (8th Cir. 1996) (Eleventh Amendment did not bar state employed faculty member's reinstatement); Cross v. State of Alabama, 49 F.3d 1490, 1503 (11th Cir. 1995) (Eleventh Amendment did not bar reinstatement of state mental health worker); Dube v. State University of New York, 900 F.2d 587, 595 (1990) (reinstatement of state university professor); Russell v. Dunston, 896 F.2d 664, 668 (2nd Cir. 1990) (state retiree's reinstatement to medical leave not barred by Eleventh Amendment). Virtually all of these cases authorizing reinstatement as prospective injunctive relief do so with little or no analysis related to the requirements set forth in Papasan. Instead, they rely on the fact that reinstatement does not affect the public fisc in the sense of awarding back pay or damages and thus fall within the Ex parte Young exception. See Edelman, 415 U.S. at 677 ("[A] federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a

retroactive award which requires the payment of funds from the state treasury. . . ."). Notably, none of the foregoing Circuit Court cases, or the cases cited by petitioner, involve a time-limited contract such as the one applicable in this case.

F. Fourth Circuit Court of Appeals Decisions

The Fourth Circuit has likewise held that, **under appropriate circumstances**, reinstatement constitutes prospective injunctive relief. In Cromer v. Brown, 88 F.3d 1315 (4th Cir. 1996), an African American sheriff's deputy sued his former employer, the sheriff of Greenville County, South Carolina, for racial discrimination and First Amendment violations. Id. at 1318. The Fourth Circuit affirmed the district court's holding that the sheriff, as a state official, was immune from suit for money damages and reversed the district court's determination that the doctrine of official immunity protected the sheriff from claims for injunctive relief stating:

> [T]o the extent Cromer sought injunctive relief (e.g., reinstatement) against Sheriff Brown in his official capacity, the district court should not have granted summary judgment to Sheriff Brown. Eleventh Amendment immunity does not protect state officials in their official capacities from § 1983 claims for injunctive relief. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 n.10, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989).[1] Therefore, we reverse the district court's dismissal of Cromer's §

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[1] Cromer incorrectly relied on Will v. Michigan Dep't of State Police which was an appeal from a state court determination of whether the state official in his official capacity is a "person" within the meaning of 42 U.S.C. § 1983. The Eleventh Amendment does not apply in state court. 491 U.S. at 63-64.

> 1983 claims against Sheriff Brown in his official capacity insofar as they request injunctive relief.

Cromer, 88 F.3d at 1332.

In Coakley v. Welch, 877 F.2d 304 (4th Cir. 1989), the court affirmed the district court's refusal to dismiss several officials of the South Carolina State Ports Authority ("SPA") from a suit brought by a terminated SPA employee. The court stated:

> Coakley granted to the district court that a decision barring his damages action against the SPA on eleventh amendment grounds would equally bar a damages action against Welch. The decision as to damages having favored Welch, the only question for us is whether the court ought also to have held Welch immune from Coakley's claim for the injunctive remedy of reinstatement. We believe the district court was correct to permit Coakley to pursue injunctive relief.
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> Papasan v. Allain, 478 U.S. 265, 106 S. Ct. 2932, 92 L. Ed. 2d 209, (1986), and McConnell v. Adams, 829 F.2d 319 (4th Cir. 1987), cert. denied, [486] U.S. [1006], 108 S. Ct. 1731, 100 L. Ed. 2d 195(1988), supply authority on this issue. Papasan indicates that Coakley has alleged a claim that falls within the purview of the Young exception. All that this requires is an assertion that "the underlying authorization upon which the named official acts is . . . illegal." Id. at 277, 106 S. Ct. 2940. The SPA regulations containing the hearing requirement that Coakley believes flouts due process supply an underlying authorization.

Papasan held, though, that "the balance of federal and state interests that [Young] embodies" recommends applying the Young exception only to cases alleging ongoing violations of federal law. Id. Papasan offered as a final observation on the matter that the difference between suits barred and litigable "will not in many instances be that between day and night." Id. 478 U.S. at 278, 106 S. Ct. at 2940 (quoting Edelman v. Jordan, 415 U.S. 651, 667, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974)). The narrow issue with which we must grapple, then, is the shadowy one of whether Welch has alleged an "ongoing violation" of law.

Papasan was an equal protection suit brought by a number of Mississippi municipal school officials and school children against various officials of the State of Mississippi. The suit alleged that a history of poor treatment by the State, amounting to a breach of trust, had resulted in severe financial disadvantages to the plaintiffs' school districts.

The Court found the defendants subject to suit under the eleventh amendment, holding that the "alleged ongoing constitutional violation -- the unequal distribution by the State of the benefits of the State's school lands -- is precisely the type of continuing violation for which a remedy may permissibly be fashioned under Young." 478 U.S. at 282, 106 S. Ct. at 2942. The Court found the essence of the complaint to be the present, and presumably ongoing, disparity in educational opportunity, and not the past actions of the State that had created the disparity. Id.

Coakley, 877 F.2d at 306.

McConnell v. Adams, 829 F.2d 1319 (4th Cir.1987), involved a political patronage violation of the First and Fourteenth Amendments. In affirming the district court, the Fourth Circuit stated:

> The appellants' actions in failing to rehire the appellees violated the appellees' rights guaranteed by the first and fourteenth amendments. The decision of the district court finding such a violation is accordingly affirmed. Since the state's eleventh amendment immunity does not protect it from suits for injunctive relief governing its officials' future conduct, the order of the district court requiring the appellants to rehire the appellees is also affirmed. Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

McConnell, 829 F.2d at 1329-30.

In another recent Fourth Circuit Court of Appeals decision, the court discussed the nature of prospective injunctive relief and discussed prior decisions of this Court.

> Both [Papasan and Milliken[2]] involve classic examples of presently experienced harmful consequences of past conduct, hence of ongoing violations of federally protected constitutional rights. As the district court put it, the state-official defendants in Milliken "were in violation of federal law at the precise moment when the case was filed."

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[2] Milliken v. Bradley, 433 U.S. 267 (1977).

The Republic of Paraguay v. Allen, 134 F.3d 622, 628 (1998) (citation omitted). In discussing its own prior decisions, the court stated:

> For the same reason, Paraguay's reliance on this court's decisions in Coakley v. Welch, 877 F.2d 304 (4th Cir. 1989), and Thomas S. by Brooks v. Flaherty, 902 F.2d 250 (4th Cir. 1990), is misplaced. Coakley held that a state employee unconstitutionally discharged from his employment suffers a "continuing violation" of that property right that could be remedied by a federal injunctive decree requiring his reinstatement. Thomas S. held that persons subjected to unconstitutional treatment when formerly in state mental institutions suffered continuing violations of those constitutional rights after their release that could be remedied by a federal injunctive decree for their care. Again, those cases concerned classic claims of ongoing violations of federally-protected property and liberty rights. As in Milliken and Papasan, at the time that those actions were filed, responsible state officials were presently violating the claimants' ongoing rights.

Paraguay, 134 F.3d at 628.

It is clear that the Fourth Circuit adheres to the majority view that reinstatement - **in an appropriate case** - is a valid form of prospective injunctive relief. The Circuit Courts of Appeal have extended Ex parte Young from enjoining an ongoing constitutional violation to enjoining an ongoing harm resulting from prior constitutional violations, assuming such an extension is the law. It is equally clear that the case at bar is not such a case.

G. Application of the Law to the Case At Bar

1. No Underlying Authorization

In this case, petitioner does not and cannot point to any **underlying authorization** upon which the individually named defendants based their allegedly impermissible conduct in terminating petitioner for her exercise of constitutionally protected speech. If, in fact, their conduct was wrongful, it certainly was not grounded in any policy or procedure officially endorsed by the Tarheel Challenge Academy or any of the other named state defendants. It was a single decision involving a single employee.

2. No Ongoing Wrong

The conduct complained of is not **ongoing**. There are two aspects to the concept of "ongoing." First, the entire rationale of the Young exception to Eleventh Amendment immunity is grounded in the notion that, pursuant to the Supremacy Clause, state officials may be enjoined from **continuing** to violate federal law. "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." Green, 474 U.S. at 68 (citations omitted).[3] Petitioners's claim is that the individually

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[3] Edelman acknowledged that the Eleventh Amendment did not bar an injunction requiring the state to comply with federal standards for processing welfare applications in the future. 415 U.S. at 664. Papasan held that the equal protection claim that Mississippi's disparity in school land grant funding was not barred by the Eleventh Amendment where the essence of the equal protection allegation was the present disparity in the distribution of the benefits of state-held assets, and not the past actions of the state. 478 U.S. at 282. In Green, this Court affirmed the denial of a declaratory judgment that state officials violated federal law in the past when there was no ongoing violation of federal law. 474 U.S.

named respondents violated her First Amendment rights in the past. Petitioner cannot show any likelihood that respondents will violate her rights in the future anymore than the plaintiff in Lyons could show that he was in jeopardy of being subjected to future illegal chokeholds. See also Mumford v. Basinski, 105 F.3d 264, 270 (6th Cir. 1997) ("[A] claim for retrospective relief for past violation(s) of federal law . . . are not exempted from the Eleventh Amendment's jurisdictional bar.").

3. Damages Are An Adequate Remedy.

A second rationale typically utilized in employment cases is that due to the wrongful discharge, the state employee suffers an "ongoing" harm by being deprived of the benefits of employment in which he/she has a constitutionally protected property interest. Even if this rationale met the requirements of Papasan, it is inapplicable in this case. Petitioner did not have any permanent or "ongoing" employment relationship with the Tarheel Challenge Academy. She had a one-year renewable contract. Petitioner was discharged on May 17, 1995. Her contract terminated on August 31, 1995. Petitioner's property interest is clearly limited by the terms of her one-year contract which expired on August 31, 1995. App. at 2a. Pearce v. Employment Sec. Comm'n of North Carolina, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998) ("Under North Carolina law, an employee has a protected 'property' interest in continued employment only if the employee can show a legitimate claim to continued employment under a contract, a state statute or a local ordinance."). An injunction cannot restore petitioner to the status quo ante because the contract term has expired. Such an order would be the functional equivalent of a breach of contract action which implicates the sovereignty of the state.

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at 73 ("There is no claimed continuing violation of federal law, and therefore no occasion to issue an injunction.").

See Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 281 (1997) (ongoing violation of property rights is the functional equivalent of a quiet title action); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 74 (1996) (detailed remedial scheme for enforcement forecloses Ex parte Young action). Such a remedy may not be available under a state breach of contract action. See Caudell v. Dellinger, 129 N.C. App. 649, 660, 501 S.E.2d 99, 106 (1998) (plaintiff not entitled to reinstatement because she had resigned and district attorney was entitled to hire an administrative assistant to "serve at his pleasure"), aff'd per curiam, 350 N.C. 89, 54 S.E.2d 304 (1999).

If she prevails, petitioner's remedy is money damages for the three and one-half months remaining on her contract at the time of her discharge. The availability of legal damages forecloses injunctive relief under traditional equitable principles. See Reuber v. United States, 750 F.2d 1039 (D.C. Cir. 1984) (discussing rationale for disallowing reinstatement as prospective injunctive relief).

The fact that reinstatement is not available pursuant to her section 1983 claim does not affect her state law claim for money damages for breach of contract. See Smith v. State of North Carolina, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976) ("[W]henever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract.") In addition, petitioner retains the potential to an award of damages from the individually named defendants in their individual capacity. Alden v. Maine, 527 U.S. 706, 757 (1999). Petitioner may not be entitled to reinstatement, but she is not without a remedy.

H. Mootness

Since the contract has long since expired, the issue of reinstatement is now moot. "'[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969)). "'The central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful review' of the issue presented." 13A Charles A. Wright, et al., Federal Practice and Procedure § 3533.3 at 261 (1984). A federal court may adjudicate a claim only if "an actual controversy [is] extant at all stages of review, not merely at the time the complaint is filed." Preiser v. Newkirk, 422 U.S. 395, 401 (1975), quoted in Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997). In Arizonans for Official English, this Court unanimously held that a state employee's change to private employment rendered moot a claim for prospective injunctive relief. 520 U.S. at 72. Petitioner's one-year contract has expired therefore her claim is moot and the individually named defendants in their official capacity were properly dismissed.

II. PETITIONER IS NOT ENTITLED TO A TRIAL IF, AFTER FURTHER DISCOVERY, THE DISTRICT COURT DISMISSES ALL FEDERAL CLAIMS.

Petitioner asserts that having twice defeated Respondents' dispositive motions to dismiss and for summary judgment, that she should be allowed to proceed to trial under Rule 56(d) of the Federal Rules of Civil Procedure because such a result would be "just." The Petitioner asks this Court to "unpack" the term "just" as it is used in Rule 56(d) as a matter of first impression. The respondents contend that the use of the term

"just" in Rule 56(d), under the facts of the case at bar, does not foreclose disposition of this case short of a trial on the merits.

Although this case has twice been reviewed by the Fourth Circuit Court of Appeals, protracted proceedings do not suspend the Rules of Civil Procedure. The Federal Rules of Civil Procedure are "as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule[s'] mandate than they do to disregard constitutional or statutory provisions." Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988). See also Chambers v. Nasco, Inc., 501 U.S. 32, 66 (1991) (Scalia, J., dissenting).

In its most recent opinion, the Fourth Circuit expressed concern that the factual record, consisting of affidavits, was insufficient to dispose of petitioner's claims on a motion for summary judgment. Pet. App. at 5. The Court remanded the case to the district court for further proceedings. Pet. App. at 5. The Court further noted that "the scant record and the parties' discussion at oral argument raise significant doubts about the ultimate viability of Godon's claims." Pet. App. at 5.

Further discovery may well develop facts sufficient to allow the district court to grant summary judgment on all issues in respondents' favor. Whether petitioner's federal claim(s) have twice been revived on appeal should not bear on the manner in which the case is ultimately determined.

CONCLUSION

For the reasons stated above, petitioner's claim for injunctive relief does not meet the criteria of prospectively remedying an ongoing wrong. Even so, the issue is moot. Therefore, the Fourth Circuit Court of Appeals did not err in affirming the dismissal of Defendants Stalls, Autry and Everett in their official capacities. In addition, there is no need for this Court to construe the term "just" as it is used in Rule 56(d) of the Federal Rules of Civil Procedure.

This Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROY COOPER
North Carolina Attorney General

Isaac T. Avery, III*
Special Deputy Attorney General

Patricia A. Duffy
Assistant Attorney General

June 22, 2001

* Counsel of Record

APPENDIX

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*STATE OF NORTH CAROLINA
CONTRACTOR NAME: K. Godon
COUNTY OF WAKE
BUDGET CODE: 14900
FUND SOURCE: 1218

AGREEMENT*

THIS AGREEMENT is hereby made between the State of North Carolina, Department of Crime Control and Public Safety, hereinafter referred to as "Agency and

GODON, KIMBERLY FERN, (Contractor Name)
1BBQCreekEstates/ Broadway, NC 27505, (Address)
(919) 499-4898 (Telephone) and 564-55-8489 (Taxpayer ID/SSN)

hereinafter referred to as the "CONTRACTOR";

WITNESSETH

That WHEREAS, the AGENCY desires to engage the CONTRACTOR to perform the professional services hereinafter described;

Therefore, the AGENCY and the CONTRACTOR do mutually agree as follows:

1. Contractual Status. The AGENCY and the CONTRACTOR agree that the CONTRACTOR shall perform

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* This original agreement was amended effective March 1, 1995 to increase petitioner's salary to $26,123. In all other respects the two agreements are identical.

the services required of the CONTRACTOR herein set forth; provided that the CONTRACTOR is not and will not by virtue of this contract acquire the status of an employee of the AGENCY.

2. Time and Place of Performance. The effective date of this agreement is 26 Aug 94 and the termination date is 31 Aug 95. The place of performance of this contract will be at a location as designated by the North Carolina National Guard, currently the Halls-Piney Grove School located in Clinton, Sampson County, North Carolina.

3. Compensation. The Agency agrees to pay the CONTRACTOR the annual sum of $23,859 and to pay the Agency's portion of social security taxes. The sum of those two figures shall represent complete and total compensation for the services to be rendered by the Contractor as set forth in paragraph four. In addition, however, all necessary and appropriate travel expenses and subsistence will be reimbursed at the current State rates, subject to the requirement that written approval must be obtained from the Director of the "Tarheel Challenge Program." In no event will there be reimbursement for commuting expenses.

4. Scope of Services to be Rendered. The CONTRACTOR hereby agrees to perform in a manner satisfactory to the AGENCY services in support of the North Carolina National Guard's "Tarheel Challenge Program" and shall serve in the capacity of Team Leader with the following description of services to be rendered by CONTRACTOR: The person in this position receives direction and guidance from the Commandant of Cadets. The purpose of this position is to provide daily supervision to Academy cadets in the residential portion of the program; Provide 24 hour, 7 days a week supervision for Academy cadets; assist instructors, Counselors and others in

cadet development activities; Conduct inspections of cadets, cadet quarters, cadet activates and activity areas; Provide for accountability, control and safety of cadets; Supervise training site preparation and training operations; Assist with awards and graduation ceremonies; Assist with in-processing and out-processing of cadets; Provide limited fire line counseling and assistance to cadets until appropriate staff are present; Transport and supervise cadets when participating in off-site Academy activities; Participate in and supervise cadet physical training activities; Provide instruction assistance when required and qualified; Coordinate with and assist other Squad Leaders in providing for cadet development and supervision; Perform all other duties as assigned. Additionally, Contractor agrees to comply with all applicable federal and state regulations relating to the Challenge Program, to include, but not limited to, submission to urinalysis and blood screening/testing.

5. Invoice. Payment under this AGREEMENT will be made monthly upon full compliance with this contract and upon receipt of an original invoice from the CONTRACTOR setting forth a time sheet and work/services performed and showing the amount due and payable pursuant to Paragraphs 3 and 4 of this AGREEMENT. All services must be performed to the satisfaction of the AGENCY prior to any payment being made.

6. Contract Administrator. Leslie T. Everett, Jr., Director of the Tarheel Challenge Program, is designated as the contract administrator for this AGREEMENT. The contract administrator is responsible for monitoring the CONTRACTOR'S performance, approving payment to the CONTRACTOR and for providing evaluation of the CONTRACTOR.

7. Funding. All terms and conditions of this AGREEMENT are dependent upon and subject to the allocation of funds for

the purposes set forth and the AGREEMENT shall automatically terminate if funds cease to be available.

8. Taxes. The CONTRACTOR shall be considered to be an independent contractor and as such shall not be entitled to any benefits and shall be responsible for all taxes except as set forth in paragraph three above. The CONTRACTOR authorizes the Agency to withhold for state and federal income taxes, social security taxes, Medicare taxes and any other amount due and payable under this agreement as provided by the provisions of the Internal Revenue Code, Title 26, United States Code. Contractor agrees to reimburse the Agency, or its assigns, for any penalty due to Contractor's failure to make any tax payments.

9. Warranty. As an independent contractor, the CONTRACTOR will hold the AGENCY harmless for any liability and personal injury that may occur from or in connection with the performance of the AGREEMENT. Any and all insurance coverage of Contractor, including liability coverage, shall be the sole responsibility of Contractor.

10. Termination of Agreement. If, through any cause, the CONTRACTOR shall fail to fulfill in a timely and proper manner the obligations under this Agreement, the AGENCY shall thereupon have the right to terminate this Agreement by giving written notice to the CONTRACTOR of such termination specifying the effective date thereof, at least (1) day before the effective date of termination. Upon termination pursuant to this paragraph, the CONTRACTOR shall be liable for any costs or expenses the AGENCY may incur in obtaining the completion of the services described in paragraph four hereof.

11. Situs. This contract shall be governed by the laws of North Carolina and any claim for breach or enforcement of the AGREEMENT shall be filed in State court in Wake County, North Carolina.

12. Antitrust Laws. This contract is entered into in compliance with all State and Federal antitrust laws.

13. Compliance with Law. The CONTRACTOR shall remain an independent contractor and as such shall be wholly responsible for the work to be performed under the supervision of his employees. The CONTRACTOR shall be responsible for compliance with all laws, ordinances, codes, rules, regulations, licensing requirements and other regulatory matters that are applicable to the conduct of the CONTRACTOR's business and work performance under this AGREEMENT, including those of Federal, State and local agencies having appropriate jurisdiction.

14. Assignment. This AGREEMENT or any interest herein shall not be assigned or transferred by the CONTRACTOR. The CONTRACTOR shall not subcontract any work to be performed pursuant to this AGREEMENT without the written approval of the AGENCY.

15. Advertisement. This AGREEMENT shall not be used for advertising by the CONTRACTOR without prior written approval of the Purchase and Contract Division of the Department of Administration.

16. Entire Agreement. This AGREEMENT, including any exhibits and amendments annexed hereto and any documents incorporated specifically by reference, represents the entire agreement between the parties and supersedes all prior oral and written statements; or agreements. This AGREEMENT may

be amended only by written amendments duly executed by the AGENCY and the CONTRACTOR.

17. This agreement does not become binding until approved by all required governmental agencies and executed by all parties.

IN WITNESS WHEREOF, the AGENCY and the CONTRACTOR have each executed this AGREEMENT, this the 25 day of August, 1994.

ATTEST:
By: \s\ Stephanie L. Scott

NORTH CAROLINA DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY:

By:\s\ Thurman B. Hampton
Thurman B. Hampton,
Secretary

ATTEST:
By:\s\ Jimmy T. Crawford

By: \s\ Kimberly Godon
CONTRACTOR

APPROVED AS TO AVAILABILITY OF FUNDS:
By: \s\ Jack W. Reavis
Jack Reavis, Controller

APPROVED AS TO FORM SUBJECT TO EXECUTION BY THURMAN B. HAMPTON, SECRETARY OF CRIME CONTROL AND PUBLIC SAFETY.

MICHAEL F. EASLEY
ATTORNEY GENERAL OF NORTH CAROLINA
BY: \s\ Linda M. Fox
Assistant Attorney General

(Original letter on letterhead)
ChalleNGe
7780 Hobbton Hwy
Clinton, NC 28328
1-800-573-9966

May 17, 1995

Ms. Kim Godon
1 BBQ Creek Estates
Broadway, NC 27505

SUBJECT: Notice of Termination of Contract

This is to notify you of the termination of your contract with the Tarheel ChalleNGe Academy, effective May 21, 1995.

This termination is based on the following:

a) By your own admission to Mr. Autry on May 9, 1995, you acknowledged you had given permission for female cadets to sleep together in single/one person beds for "safety and security reasons". You also acknowledged that Mr. Boone, the Commandant of cadets, had specifically told you such a practice was not allowed.

b) You received a verbal counseling on April 28 and a written on May 5, 1995 regarding certain aspects of your performance of duty (Team Leader) in which you were placed on probation for the remainder of your contract. On May 6, 1995, you told the cadets that you had been counseled and placed on probation. Later that day, Mr. Autry was presented a copy of a petition signed by approximately 60 personnel, (mainly cadets) asking that we (the Academy) keep you here as Team Leader for Team 1.

It is inconceivable to me you would take either of the two actions listed above. Not only was the first action prohibited (females sleeping together), it gives two erroneous perceptions: first, that the Academy supported your concurrence of females sleeping together and secondly, that we have a "safety and security" problem here.

Your second action is seen as a deliberate attempt to involve cadets in what is purely a management/supervisor matter. Our cadets have enough demands and stress without being solicited to take sides in a situation in which they have absolutely no reason to be involved in.

I regret the necessity to terminate your contract. Your contract termination is deemed to be in the best interest of the Tarheel ChalleNGe Academy program.

Questions may be addressed to the undersigned or in my absence to Mr. Stalls.

\s\
Leslie T. Everett
Director
Tarheel ChalleNGe Academy